INDEX

	Page
INTEREST OF THE AMICI CURIAE	1
STATEMENT	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. Respondents' Practices Violate the Equal Protection Clause	7
II. Respondents' Practices Violate Title VI of the Civil Rights Act of 1964, and the Regulations and Respondents' Assurances Thereunder	18
APPENDIX	
Assurance of Compliance with the Department of Health, Education and Welfare Regulations under Title VI of the Civil Rights Act of 1964, HEW Form 441, executed January 20, 1965, by San Francisco Unified School District	25

TABLE OF CITATIONS

CASES: Page

Brown v. *Board of Education*, 347 U.S. 483 (1954) 16-17
Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 10
Graham v. *Richardson*, 403 U.S. 365 (1971) 10
Griffin v. *Illinois*, 351 U.S. 12 (1956) 15
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 21
Hawkins v. *Town of Shaw*, 461 F.2d 1171 (5th Cir., 1972) (en banc) 9
Kemp v. *Beasley*, 352 F.2d 14 (8th Cir., 1965) 21
Keyes v. *School District No. 1*, 41 U.S.L.W. 5002 (1973) 8
Korematsu v. *United States*, 323 U.S. 214 (1944) 10
Mills v. *Board of Education*, 348 F. Supp. 866 (D.D.C., 1972) 14, 16
Norwalk CORE v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir., 1968) 9, 22
Oyama v. *California*, 332 U.S. 633 (1948) 10
Paul v. *United States*, 371 U.S. 245 (1963) 19
Pennsylvania Ass'n for Retarded Children v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa., 1971) 14
Price v. *Denison Independent School District Bd. of Ed.*, 348 F.2d 1010 (5th Cir., 1965) 21
Public Utilities Commission of California v. *United States*, 355 U.S. 534 (1958) 19
San Antonio Ind. School District v. *Rodriguez*, 41 U.S.L.W. 4407 (1973) 3, 10, 15, 17
School Board of the City of Richmond v. *State Board of Education*, 41 U.S.L.W. 4685 (1973) 8
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 16
Singleton v. *Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir., 1965) 21
Stanley v. *Illinois*, 405 U.S. 645 (1972) 12
Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 21
United States v. *Jefferson County Bd. of Ed.*, 380 F.2d 385 (5th Cir., 1967) (en banc) 21

TABLE OF CITATIONS—Continued

	Page
Ward v. *Winstead*, 314 F. Supp. 1255 (N.D. Miss. 1970)	18
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886)	10
Yu Cong Eng v. *Trinidad*, 271 U.S. 500 (1926)	10

CONSTITUTIONS, STATUTES AND REGULATIONS:

California Code Civ. Proc.

§ 185	14
§ 198	14

California Education Code

§ 71	8, 9, 11, 12, 16
§ 5761	9, 11
§ 5770	9
§ 5901	9
§ 6060	9
§ 6061	11
§ 6450	9
§ 6457	11
§ 6499.200	9, 11
§ 6750	8
§ 6801	8
§ 6870	9
§ 6901	8
§ 8551	12
§ 8573	8, 12
§ 12101	7, 8, 11, 16
§ 13187.6	11
§ 18251	9

California Constitution

Art. IV, § 24	14
Art. IX, § 1	11

TABLE OF CITATIONS—Continued

Page

Civil Rights Act of 1964, Title VI

Section 601, 42 U.S.C. § 2000d 2, 5, 6, 18, 19
Section 602, 42 U.S.C. § 2000d-1 ..... 19, 20

Code of Federal Regulations, 45 C.F.R. Part 80

§ 80.4 ..... 6, 23
§ 80.5 ..... 6, 20

Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241a *et seq.* 19, 20, 23
35 Fed. Reg. 11595 ..... 6, 20-21
34 Stat. 805 2

United States Constitution

Fourteenth Amendment, Equal Protection Clause 2, 5, 6, 7, 10, 15, 16, 17

United States Code

8 U.S.C. § 1423 13
42 U.S.C. § 1983 5

MISCELLANEOUS:

Andersson and Boyer, *Bilingual Schooling in the United States* 12
Final Report of Select Committee on Equal Educational Opportunity, Toward Equal Educational Opportunity, S. Rep. No. 92-000, 92d Cong., 2d Sess. (1972) 22
Hearings before the General Subcommittee on Education of the House Committee on Education and Labor on H.R. 9840 and 10224, the Bilingual Education Program, 90th Cong., 1st Sess. 2
Message of President Nixon on Busing and Equality of Educational Opportunities, March 20, 1972, H. Doc. No. 92-195, 92d Cong., 2d Sess. 22
NEA, *1973 Handbook* 3

TABLE OF CITATIONS—Continued

	Page
NEA, *The Invisible Minority* (1966)	2
39 Ops. Atty. Gen. Calif. 149 (1962)	9
U. S. Commission on Civil Rights, *Mexican-American Education Study*:	
Report No. II, *The Unfinished Education* (1971)	5
Report No. III, *The Excluded Student* (1972)	5, 12
Report No. V, *Teachers and Students* (1973)	5
U. S. Dept. HEW, HEW News, May 25, 1972	22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, *et al.*,
Petitioners,

v.

ALAN H. NICHOLS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE CALIFORNIA TEACHERS ASSOCIATION AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

All parties have consented to the filing of this brief on behalf of the National Education Association and the California Teachers Association as amici curiae in support of the position of the petitioners.[1]

---

[1] The consents of both the petitioners and the respondents are being filed with the Clerk of the Court in accordance with Rule 42 (2) of the Rules of the Court.

The National Education Association ("NEA") is an independent voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. NEA was founded in 1857, chartered by Congress in 1906, and has more than one million three hundred thousand members. The California Teachers Association ("CTA"), the California state affiliate of NEA, has more than 140,000 regular members. One of the principal purposes of the NEA and the CTA is to promote the education of all children in the United States. 34 Stat. 805.

The interest of the amici curiae in this case stems from that purpose. The principal questions presented are whether the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and the regulations thereunder, permit a public school system to instruct non-English speaking children all day in classes taught in English, without assisting the children to learn English, thus effectively excluding many of the children from the benefits of public education. The NEA and the CTA are concerned with the plight of non-English speaking students trapped in schools where they cannot learn. The harm done by failing to meet the needs of non-English speaking children in the public schools has been described and documented by NEA in *The Invisible Minority* (1966), reprinted as part of the Hearings before the General Subcommittee on Education of the House Committee on Education and Labor on H.R. 9840 and 10224, Bilingual Education Program, 90th Cong., 1st Sess. pp. 168-210, and included in the record in this case.[2] In 1972 the Representative Assembly of NEA adopted a Continuing Resolution urging the provision of "necessary funds and . . . material . . . for students to whom English must be

[2] Plaintiff's Exhibit No. 1.

taught as a second language." NEA, *1973 Handbook*, at 55.

However, the court below, asserting that the children's problem is "the result of deficiencies created by [the children] themselves in failing to learn the English language" (A. 133),[3] held that the requirements of the Equal Protection Clause are satisfied as long as the school system provides the children "with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district" (A. 132). That holding sanctions the effective exclusion from public education of a substantial number of non-English speaking children in the United States today. The practical exclusion of those children, because of factors for which the children themselves are not responsible, is a matter of the gravest concern to those who, like the amici, are interested in the education of *all* children in the United States.[4]

STATEMENT

Petitioners represent San Francisco children of Chinese descent who do not speak or understand English and receive no instruction to teach them English, although English is the language of instruction in the San Francisco public schools (A. 113-114). In consequence, the children do not understand their teachers or textbooks and benefit little from their schooling (A. 61-64, 71-78, 96-110).

---

[3] Citations to "A." are to the Appendix in this case.

[4] The NEA and its State affiliates have participated as *amici curiae* in numerous recent cases before this Court involving the provision of equal educational opportunity. *E.g.*, *Keyes* v. *School District No. 1*, 41 U.S.L.W. 5002 (June 21, 1973); *San Antonio Ind. School District* v. *Rodriguez*, 41 U.S.L.W. 4407 (March 21, 1973); *School Board of the City of Richmond* v. *State Board of Education*, 41 U.S.L.W. 4685 (May 21, 1973).

The consequences of respondents' failure to teach petitioners English, and thereby to open their educational program to petitioners, are severe. That is demonstrated dramatically by respondents' own applications for federal funds. According to respondents, when non-English speaking children of Chinese extraction in San Francisco "are placed in grade levels according to their age and are expected to compete with their English speaking peers, they are frustrated by their inability to understand the regular class work. The problem is particularly severe for those in the high school age group. . . . Few are motivated to continue through adult school and they become dropouts" (A. 101). "For children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto" (A. 103-104) —a ghetto in which one finds "substandard housing, overcrowded living quarters, the highest TB and suicide rates in the city, [and] severe unemployment and underemployment" (A. 100). "Chinatown has become a slum as well as a ghetto" (A. 101). "The only hope of removing this cause of poverty lies in adequate education" (A. 104).

So too, the United States Commission on Civil Rights has published studies documenting the exclusion of Spanish-speaking children from the benefits of educational programs in this country, noting that "ability to communicate is essential to attain an education, to conduct affairs of state and commerce, and, generally, to exercise the rights of citizenship."[5] In the political arena, non-English speaking citizens are seriously handicapped; as the court below observed, "an appreciation of English is

[5] U.S. Comm. on Civil Rights, Mexican-American Education Study, Report No. III, *The Excluded Student* (1972), p. 13 and *passim*; see also Report No. V, *Teachers and Students* (1973), pp. 43-44 and *passim*; Report No. II, *The Unfinished Education* (1971), *passim*.

essential to an understanding of legislative and judicial proceedings, and of the laws of the State," and indeed is a prerequisite for naturalization as a citizen (A. 127). Economically, as respondents have demonstrated so cogently in applications for federal funds, non-English speaking children are doomed to become "dropout[s]" and "unemployable[s] in the ghetto" unless they are taught English (A. 103-104).

Accordingly, petitioners sought in this action, brought under 42 U.S.C. § 1983, to require respondents to provide them assistance in learning English so that they might benefit from school as other children do. They contended that respondents' failure to provide such assistance violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 and regulations thereunder. (A. 6, 16-19, 23-24.)

The court below rejected petitioners' claims. It concluded that petitioners are entitled only to "the same facilities, textbooks, teachers and curriculum as is provided to other chlidren in the district," because their "language deficiency . . . was not caused directly or indirectly by any State action" (A. 127). One member of the original panel, Judge Hill, dissented (A. 131-139), and the decision provoked a request for rehearing en banc by a member of the court who was not a member of the original panel (A. 141). A rehearing en banc was denied after certiorari was granted (A. 140, 141), but the denial of a rehearing produced a dissenting opinion by two members of the court who were not members of the original panel, Judges Hufstedler and Ely (A. 141-147).

SUMMARY OF ARGUMENT

We show in this brief that the decision below was incorrect. To be sure, respondents did not "cause" petitioners' "language deficiency." However, they "cause"—

in fact they *require*—petitioners to attend classes taught in English without assistance in learning the language. Petitioners cannot benefit from those classes, unlike their English-speaking peers. Thus, respondents' practices deny an education to these children who do not speak English, a characteristic determined by the national origin of their parents.

Under the Equal Protection Clause, practices that disadvantage a minority of that kind are suspect. They require strict judicial scrutiny and cannot be sustained unless the responsible governmental authorities can show that they serve a compelling state interest. Respondents have not attempted to make such a showing. In fact, respondents' policies have no rational basis in any system of universal compulsory education.

Moreover, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of national origin in federally assisted programs and activities (42 U.S.C. § 2000d). Regulations thereunder expressly prohibit discrimination on the basis of national origin in public schools receiving federal funds (45 C.F.R. § 80.5). HEW guidelines state that those prohibitions require school districts to take affirmative steps to remedy the inability to speak and understand English when failure to do so will exclude national origin-minority group children from effective participation in the educational program (35 Fed. Reg. 11595). The San Francisco public schools receive federal financial assistance, and in exchange for federal aid have *expressly* agreed to comply with Title VI and "all requirements imposed by or pursuant to" the HEW regulations.[6] Therefore, the failure to teach petitioners English violates Title VI and the regulations and respondents' express assurances.

---

[6] See the appendix to this brief; 45 C.F.R. § 80.4.

Accordingly, the decision below should be reversed on both constitutional and nonconstitutional grounds.

ARGUMENT

I

RESPONDENTS' PRACTICES VIOLATE THE EQUAL PROTECTION CLAUSE

English is the language in which classes are taught in the San Francisco public schools. Petitioners are required to attend those schools by California's compulsory attendance law. Calif. Ed. Code § 12101. However, petitioners speak only Chinese; they do not understand English. Therefore, as the parties below agreed, they need help in learning English in order to benefit from their classroom programs. (A. 60-70, 71-78, 97-104, 113-114).[7] In the words of respondents' Superintendent of Schools, such children need "to learn English so that they can communicate with others and proceed normally with classroom work" (A. 61).

Petitioners are not receiving that help. They sit uncomprehendingly in classes in which they cannot participate and from which they cannot benefit—classes designed only to meet the educational needs of San Francisco's English-speaking children. As the district court observed, "They are not studying and they are not learning . . . , you can't call them students. They need something, and that something is language instruction."[8] As Judges Hufstedler and Ely stated, "Access to education offered by the public schools is completely foreclosed to these

---

[7] See also transcript of hearing, May 12, 1970, pp. 2-3 (record on appeal, vol. II, pp. 2-3).

[8] Transcript of hearing, May 12, 1970, p. 18 (record on appeal, vol. II, p. 18).

children who cannot comprehend any of it. They are functionally deaf and mute." (A. 142.)

Thus, respondents' failure to teach petitioners the language in which respondents conduct their classes denies these children an education, unlike their English-speaking peers. The San Francisco system thereby discriminates against children like the petitioners. The fact of discrimination cannot seriously be contested. The question presented is whether the discrimination is permissible.

The court below was of the view that the discrimination involved in the case is permissible because respondents are not responsible for petitioners' language "deficiencies" —that the denial of education to petitioners "is not the result of laws enacted by the State presently or historically, but the result of deficiencies created by appellants themselves in failing to learn the English language" (A. 133). However, as Judges Hufstedler and Ely noted—

> "The state's response to the non-English speaking Chinese children is not passive. The state compels the children to attend school (Cal. Educ. Code § 12101), mandates English as the basic language of instruction (Cal. Educ. Code § 71), and imposes mastery of English as a prerequisite to graduation from public high school (Cal. Educ. Code § 8573). The pervasive involvement of the State with the very language problem challenged forbids the majority's finding of no state action." (A. 143.)

Respondents meet the particular educational needs of virtually all children in San Francisco in circumstances where failure to do so will result in a denial of education to the children.* Approximately ten percent of the

---

* The California Education Code provides for programs for physically handicapped children, § 6801 et seq., for mentally retarded children, § 6901 et seq., for deaf children, § 12801 et seq., and for "educationally handicapped" children, § 6750 et seq. In addition, the Code authorizes programs for children with reading disabili-

children in San Francisco have such needs. With the exception of children like the petitioners, who speak languages other than English, those needs are being met (A. 94-96, 26-27, 33, 55, 58). Effective techniques[10] and qualified teachers[11] are readily available to teach petitioners English. In short, respondents incontestably *are* responsible for what goes on in their classrooms. They cannot seriously deny responsibility for choosing not to teach petitioners English or otherwise helping them to learn, or for the inevitable consequences of that choice—the discriminatory exclusion of petitioners from education. *E.g.*, *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 930-931 (2d Cir., 1968); see also *Hawkins* v. *Town of Shaw*, 461 F.2d 1171, 1172-1173 (5th Cir., 1972) (en banc).

Under this Court's previous decisions, it is clear that the discriminatory denial of education that results from

---

ties, § 5770 et seq., disadvantaged children including those who are language handicapped, § 6450 et seq., non-English speaking children, §§ 71, 5761 et seq., 6060, and children who need special instruction in English, § 6499.200. Finally, the Code authorizes programs for all other exceptional children, § 6870 et seq. The Attorney General of California has ruled that the provisions of the Education Code "make clear that any minor who is . . . physically handicapped or mentally retarded . . . shall be furnished with [appropriate] education." 39 Ops. Atty. Gen. Calif. 149, 151 (1962). Pursuant to these provisions, San Francisco provides programs for virtually all kinds of mentally, physically and educationally handicapped children (A. 94-96), *except* numbers of children like petitioners who speak a language other than English, principally Spanish and Chinese (A. 26-27, 33, 55, 58). Indeed, San Francisco presumably offers a variety of elective courses for secondary students to meet those students' particular educational objectives, even though the failure to provide the courses, unlike failure to teach English to petitioners, would not deprive any student of access to education. *E.g.*, Calif. Ed. Code §§ 18251, et seq. (driver education); 5901 et seq. (vocational training).

[10] See Brief Amicus Curiae of the Center for Law and Education, Harvard University, in Support of Petition for Certiorari, p. 11 at n. 6.

[11] See Plaintiffs' Affidavits of Wilfred Ho and Fletcher Chan (record on appeal, vol. I, pp. 188-191).

refusing to teach children the language in which their classes are conducted or to help them to learn in some other way is *not* permissible under the Equal Protection Clause. This has become "an English-speaking nation," as the court below observed (A. 132). Children who speak Chinese are a distinct racial and ethnic minority, and the language they speak is determined by the national origin of their parents. Respondents' practices disadvantage those children as a class. Under the Equal Protection Clause, governmental practices that disadvantage a class of that kind are "immediately suspect." *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944).[12] Since respondents' practices "operate to the peculiar disadvantage of [a] suspect class," *San Antonio Ind. School District* v. *Rodriguez*, *supra*, slip op., p. 24, they demand "strict judicial scrutiny"; they are "not entitled to the usual presumption of validity"; respondents "must carry a 'heavy burden of justification' "; and respondents must show that the "educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objections." *Id.*, at 12.[13]

In short, respondents must show that their practices that deny petitioners an education are justified by a

---

[12] See also *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500 (1926); *San Antonio Ind. School District* v. *Rodriquez*, *supra*, slip op., at 18, 24, and concurring opinion of Stewart, J., at 3; *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971); *Oyama* v. *California*, 332 U.S. 633, 644-646 (1948); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

[13] It does not matter that some children of Chinese descent speak and understand English, and therefore that respondents' practices discriminate only against non-English speaking children of minority national origin. *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500 (1926). The language spoken by the non-English speaking children is a characteristic of their national origin, and in any event there is no justification for discrimination against any "readily isolated segment" (*Gomillion* v. *Lightfoot*, 364 U.S. 339, 346 (1960)) or "definable category" (*San Antonio Ind. School District* v. *Rodriguez*, *supra*, at 20) of an ethnic minority.

compelling state interest. Respondents have not attempted to make such a showing at any time in the course of this litigation. Accordingly, the decision below should be reversed.

In fact, even if respondents' practices did not involve a "suspect" class and therefore were subject to a less stringent test of equal protection, they could not be defended because they do not have any "rational relation" to the California system of universal compulsory education; they have no "rational basis" in California policy. The purpose of California's educational system is, of course, to educate. As stated in the state constitution, "a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people. . . ." Calif. Const., art. IX, § 1. Under the state compulsory attendance law, that purpose extends to "each child" in the State between the ages of 6 and 16. Calif. Ed. Code § 12101. Moreover, it is the statutory "policy of the state to insure mastery of English by all pupils in the schools." Calif. Ed. Code § 71.[14]

---

[14] Section 71 of the California Education Code provides that "English shall be the basic language of instruction in all schools"; states that "[i]t is the policy of the state to insure the mastery of English by all pupils in the schools"; and authorizes local school districts to offer bilingual instruction when it "is educationally advantageous to the pupils" (A. 64). According to the former State Superintendent of Public Instruction, the "intent of the law is to permit the non-English speaking child to progress in his studies in his native language while learning the English language until he reaches that stage of language development where he can compete successfully with his peers in [English]" (A. 64-65). Pursuant to that objective, the legislature has enacted the Bilingual Education Act to "develop in each child fluency in English so that he may then be enrolled in the regular program in which English is the language of instruction" (Calif. Ed. Code § 5761 *et seq.*). California school districts are authorized to "establish and maintain special programs or classes . . . in speaking, reading and writing the English language for foreign-born minors and native-born minors." Calif. Ed. Code § 6061. See also Calif. Ed. Code §§ 6457, 6499.200, 13187.6. And, the Code further provides that mandatory

Refusing to teach petitioners English is flatly opposed to policies expressed in those statutory provisions. It cannot be reconciled with the state policy "to insure mastery of English by *all* pupils in the schools." Calif. Ed. Code § 71 (emphasis added). And, since the failure to teach petitioners English excludes them from the benefits of education, the practice cannot be reconciled with the fundamental state policy of educating "*each* child" in the State between the ages of 6 and 16, expressed in the compulsory attendance law. Indeed, respondents' practices deny education to children whose need for it is greatest, according to respondents' own publications. See pp. 4-5, *supra*. Therefore, respondents' failure to teach non-English speaking children the language in which respondents conduct their classes or to make it possible in some other fashion for the children to learn has no "rational basis" in California policy. It is plainly opposed to fundamental policies of the State. It "spites [the State's] own articulated goals." *Stanley* v. *Illinois*, 405 U.S. 645, 653 (1972).

To be sure, experts differ as to the best way to teach English to non-English speaking children. Some experts advocate "bilingual" programs taught by bilingual teachers who understand the student's original language, while others prefer programs taught by teachers who speak only English but are trained in techniques of teaching the language to non-English speaking children.[15]

---

courses of study shall include "English, including knowledge of, and appreciation for literature and the language, as well as the skills of speaking, reading, listening, spelling, handwriting, and composition" (Calif. Ed. Code § 8551(a)), and that mastery of English shall be required for graduation from high school (Calif. Ed. Code § 8573).

[15] U.S. Comm. on Civil Rights, *The Excluded Student* (1972), pp. 21-29, 48-49; Andersson and Boyer, *Bilingual Schooling in the United States* (G.P.O., 1969), vol. 1, p. 12.

There is *no* responsible support, however, for San Francisco's ostrich-like approach to petitioners—simply ignoring their needs. Indeed, San Francisco's school authorities agree with everyone else that these children "need . . . *instruction*" in English "to enable them to function effectively in a regular class" (A. 61) (emphasis added). The question here is not whether one educational technique or another is preferable, but whether the school district can refuse to provide any meaningful language instruction, and thus any meaningful education, to petitioners in these circumstances.

It is no answer to say, as did the court below, that "[a]s long as there is no discrimination by race or national origin, . . . the States should be free to set their educational policies, . . . subject only to the requirement that their classifications be rationally related to the purposes for which they were created" (A. 129). As we have shown, respondents' approach *does* discriminate by national origin. And apart from that, practices that deny a particular group of children "mastery of English" and the benefits of education, far from being "rationally related" to the purposes of any system of universal public education, are wholly at odds with those purposes.

Nor is it possible to defend respondents' practices on the ground that the "only classification in the instant case is the decision to use English as the language of instruction" (Resp. Br. Opp. 12), a decision said to be reasonable because, in the words of the court below,—

> ". . . the State's use of English as the language of instruction . . . is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation. Knowledge of English is required to become a naturalized United States citizen, 8 U.S.C. § 1423(1); likewise, California requires

> knowledge of the language for jury service, Cal. Code Civ. P. § 198(2), (3). Similarly, an appreciation of English is essential to an understanding of legislative and judicial proceedings, and of the laws of the State, Cal. Const. art. IV, § 24; Cal. Code Civ. P. § 185, and of the nation . . ." (A. 127).

To be sure, those considerations may well justify the choice of English as the language of instruction. However, it is not the decision to use English as the language of instruction that is challenged in this case, but respondents' failure to provide educationally for a class of children who cannot understand English. That is the practice that gives rise to the challenged differentiation—between children who are educated and those who are not. The considerations advanced by the court below to justify the choice of English as the language of instruction show that petitioners *should* be taught English. They obviously do not justify a *refusal* to teach petitioners the language.

Nor is it an answer to say that all children in San Francisco are provided the "same facilities, textbooks, teachers and curriculum" (A. 128). By a parity of reasoning, blind children can be expected to read textbooks they cannot see, deaf children can be required to understand lectures they cannot hear, and children in wheelchairs can be asked to make their way to classrooms accessible only by climbing stairs.[16] That is the kind of reasoning

---

[16] The educational rights of mentally and physically handicapped children are currently the subject of a number of cases pending in the lower courts. *E.g.*, *Mills* v. *Board of Education*, 348 F. Supp. 866 (D. D.C., 1972); *Pennsylvania Association for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa., 1971). There is a substantial basis for the claim by handicapped children that they cannot lawfully be subjected to practices that deny them access to education because their exclusion from education serves no compelling state interest, and they constitute a "suspect" class for purposes of equal protection in that they are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness

to which Anatole France referred: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." *Griffin* v. *Illinois*, 351 U.S. 12, 23 (1956) (concurring opinion of Mr. Justice Frankfurter). As Judges Hufstedler and Ely observed, "The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk." (A. 144.) In fact, San Francisco provides all kinds of special programs to meet individual educational needs of particular children.[17] Therefore it simply is not true that all children are provided the "same facilities, textbooks, teachers and curriculum."

The view of the court below was based on the misconception that the question presented is whether the schools must meet the "special" educational problems of each child who has a problem that "can be overcome" (A. 126). That is not the question in this case for no such broad claim has been made here. Rather, petitioners claim that practices which exclude minority children from education because of characteristics determined by their national origin serve no compelling state interest, and indeed, have no "rational relation" to any system of universal compulsory education.

Finally, it is not relevant to point out, as did the court below, that "the Equal Protection Clause does not require that a state must choose between attacking every aspect

---

as to command extraordinary protection from the majoritarian political process." *San Antonio Ind. School District* v. *Rodriguez*, *supra*, slip. op., p. 24. Moreover, even if that were not the case, there is a substantial basis for contending that there is no "rational basis" for the total *exclusion* of handicapped children from a system of universal compulsory public education. See *id.* at 47. However, there is no need in this case to pass on the claims of these other groups of children.

[17] See footnote 9, *supra*.

of a problem or not attacking the problem at all," or that "a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' " (A. 129). The refusal to teach petitioners English excludes them from education. A judgment that the "problem" of educating California children should be "attacked" "one step at a time" by leaving some children out altogether is contrary to the policy, expressed in the State's compulsory attendance law, and educating "each" child (Calif. Ed. Code § 12101); and a decision not to teach English to non-English speaking children is opposed to the State's policy of insuring "mastery of English by *all* pupils in the schools" (Calif. Ed. Code § 71, emphasis added). Moreover, even if California policy were otherwise, a decision to attack the "problem" of educating children by *denying* education to a class of children *determined by their national origin*, either for wholly arbitrary reasons or simply to avoid expense,[18] discriminates indiviously against the children who are denied education, and therefore is impermissible under the Equal Protection Clause. Perhaps States may conduct lotteries to raise revenue for education, but surely they should not be allowed to make a lottery out of education itself. "[T]he opportunity of an education, . . . where the state has undertaken to provide it, is a right which must be made available to *all* on equal terms." *Brown* v.

---

[18] We note that San Francisco has never claimed that added expense justifies its treatment of petitioners. Even if that were not the case, however, expense would not be a legitimate excuse for an otherwise invidious discrimination, *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969), and therefore is no excuse for refusing to provide education for some children while providing it for others. As stated in *Mills* v. *Board of Education*, *supra*, 348 F. Supp., at 876: "If sufficient funds are not available . . . then the available funds must be expended equitably in such a manner that no child is entirely excluded from publicly supported education." That is the effect of respondents' practices here.

Board of Education, 347 U.S. 483, 493 (1954) (emphasis added); *San Antonio Ind. School District* v. *Rodriguez*, *supra*, slip op., p. 26.

Thus, when this Court sustained the Texas system of school finance in *San Antonio Ind. School District* v. *Rodriguez*, *supra*, it emphasized that the Texas system did not result in "an absolute deprivation of education" for any child or identifiable group of children, and that instead the system assured "*every* child in *every* school district an adequate education." *Id.*, slip op., p. 20, nn. 59, 60 (emphasis added). The rationality of the State's arrangements in that regard, in a system of universal compulsory education, could be defended *precisely* because they were "responsive to . . . two forces"—they encouraged local participation, "[*w*]*hile assuring a basic education for every child in the State.*" *Id.*, at 45 (emphasis added). Here, however, the challenged practice insures that some children will *not* receive an adequate basic education, or indeed any education at all. Unlike the Texas system of school finance, the practice challenged here has no rational relation to the State's system of universal compulsory education.

As Judges Hufstedler and Ely concluded, respondents "did not meet even" the "minimal burden" imposed by the "rational relation" test. Their "obligation was to meet the far more stringent test of strict scrutiny." (A. 145, 146.) Therefore, the failure to teach petitioners the language of instruction violates the Equal Protection Clause. The decision below to the contrary accordingly should be reversed.

II

RESPONDENTS' PRACTICES VIOLATE TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, AND THE REGULATIONS AND RESPONDENTS' ASSURANCES THEREUNDER

Apart from the constitutional violation discussed in Part I of this brief, respondents' failure to teach petitioners English violates Section 601 of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, the regulations thereunder, and respondents' assurances to the Department of Health, Education and Welfare, made to obtain federal funds. Therefore, the Court need not reach the constitutional issue. "If a violation of § 2000d is shown by the proof, [the court] need not reach the constitutional questions, and it is a favored policy of federal courts to decide cases on statutory grounds wherever possible." *Ward* v. *Winstead*, 314 F. Supp. 1255 (N.D. Miss., 1970) (three-judge court, per Judge Keady). The court below rejected petitioners' contentions as to Title VI perfunctorily.[19] Its decision in that regard was erroneous.

Title VI provides that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" because of his "race, color or national origin." 42 U.S.C. § 2000d.[20]

---

[19] In its opinion, the court below noted that petitioners relied on Title VI of the 1964 Act, and stated that Title VI "requires affirmative action in which a person is 'excluded' from participation, 'denied' the benefits, and 'subjected' to discrimination" (A. 121). The court rejected petitioners' Title VI claim with the statement that "our determination of the merits of the other claims of appellants will likewise dispose of the claims made under the Civil Rights Act" (A. 121). The court did not elaborate.

[20] Section 601 provides in full: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d.

The San Francisco schools receive federal financial assistance (*e.g.*, A. 38-39). Conducting classes in English without making arrangements for the education of children who speak only the language of their non-English speaking national origin effectively denies those children an education. Thus, respondents' practices "exclude" petitioners "from participation in" respondents' educational programs; they "deny" petitioners "the benefits of" those programs; and they "subject" petitioners "to discrimination" in those programs. Therefore, the failure to teach petitioners English or otherwise to provide for their education violates Title VI.

Moreover, Title VI further provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 42 U.S.C. § 2000d-1. Those rules, regulations and orders must be approved by the President. 42 U.S.C. § 2000d-1.

That is a clear grant of substantive rule-making power [21] to effectuate Title VI in a manner that blends the objective of Title VI, nondiscrimination, with the "objectives of the statute authorizing the financial assistance"—*e.g.*, in the case of the Elementary and Secondary Education Act, 20 U.S.C. § 241a et seq., to aid "local educational agencies to support adequate educational pro-

---

[21] Compare *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542 (1958) (regulations issued by Secretary of Army pursuant to power to "prescribe regulations to carry out his functions, powers and duties under this title" held to "have the force of law"); see also *Paul* v. *United States*, 371 U.S. 245, 255 (1963).

grams" and to meet "the special educational needs of educationally deprived children" (20 U.S.C. § 241a).

Pursuant to those provisions, the Department of Health, Education and Welfare has issued, and the President has approved, regulations that provide that in programs for support of elementary or secondary schools,

> "discrimination by the recipient school district in any of its elementary or secondary schools . . . in the treatment of its students in any aspect of the educational process is prohibited. . . . [T]he prohibition of discrimination in the treatment of students . . . includes the prohibition of discrimination among the students . . . in the availability . . . of any academic . . . facilities of the grantee or other recipient." 45 C.F.R. § 80.5(b).

Those regulations have the "force of law." [22] They are not simply an administrative "interpretation" of Title VI. Rather, they rest on the view of the Department and the President as to the appropriate way in which to "effectuate" the objective of Title VI, elimination of discrimination, while "achieving" the educational "objectives of the statute[s] authorizing . . . financial assistance" for public school systems. 42 U.S.C. § 2000d-1.

Conducting classes in English without making provision for non-English-speaking children denies those children an education and thus discriminates against "students in [an] aspect of the educational process" and discriminates "among the students . . . in the availability . . . of . . . academic . . . facilities . . ." (45 C.F.R. § 80.5(b)). Therefore, the failure to teach petitioners English or otherwise to provide for their education violates the regulations under Title VI.

That conclusion is confirmed by guidelines published by the Department to "clarify D/HEW policy on issues

[22] See note 21, supra.

concerning the responsibility of school districts to provide equal educational opportunity to national origin-minority group children deficient in English-language skills" (35 Fed. Reg. 11595). The guidelines explain the effect of the prohibition against discrimination on the responsibilities of public schools to children like the petitioners. The guidelines are based on findings by the Department that "inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program," and that this has "the effect of denying equality of educational opportunity to . . . disadvantaged pupils from . . . national origin-minority groups" in violation of Title VI (35 Fed. Reg. 11595). Accordingly, the guidelines provide:

> "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 35 Fed. Reg. 11595.

The departmental guidelines, reflecting the Department's construction of the Act and the regulations, are "entitled to great weight." [22]

Indeed, the administrative construction reflected in the guidelines is the only construction that gives the Act and the regulations any content when school authorities choose to provide programs from which non-English children

---

[22] *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *United States* v. *Jefferson County Bd. of Ed.*, 380 F.2d 385, 390 (5th Cir., 1967) (en banc); *Price* v. *Denison Independent School District Bd. of Ed.*, 348 F.2d 1010, 1013 (5th Cir., 1965); *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir., 1965); *Kemp* v. *Beasley*, 352 F.2d 14, 18-19 (8th Cir., 1965).

cannot benefit until they are taught English. Requiring affirmative steps to remedy language deficiencies when the inability to speak and understand English excludes children from education will minimize community resistance to the effective education of minority group children. "[S]ome of the most dramatic, wholesale failures of our public school systems occur among members of the language minorities. . . . What these conditions add up to is a conscious or unconscious policy of linguistic and cultural exclusion and alienation." Final Report of Select Committee on Equal Educational Opportunity, Toward Equal Educational Opportunity, S. Rep. No. 92-000, 92d Cong., 2d Sess. (1972), p. 277. Therefore, as the President has concluded, "School authorities must take appropriate action to overcome whatever language barriers might exist, in order to enable all students to participate equally in educational programs." Message on Busing and Equality of Educational Opportunities, Mar. 20, 1972, p. 8, H. Doc. No. 92-195, 92d Cong., 2d Sess. In short, the Department is right in its view that "to deny equal educational opportunity because of a child's language or heritage is as much a violation of law as to segregate children by race. . . ." U.S. Dept. HEW, HEW News, May 25, 1972, p. 1.[24]

---

[24] In circumstances like these, affirmative steps to prevent facially neutral policies from having a sharply unequal impact on racial or ethnic minorities are frequently necessary and are required. *E.g. Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir., 1968) (" 'Equal protection of the laws' means more than merely the absence of governmental action designed to discriminate; . . . 'we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.' ").

Moreover, respondents have applied for and have accepted funds under the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 241a; A. 38-39, 97-110). In order to obtain those funds, respondents are required to give express assurance that their programs "will be conducted . . . in compliance with all requirements imposed by *or pursuant* to" 45 C.F.R. Part 80 (45 C.F.R. § 80.4). Accordingly, respondents have expressly agreed, "in consideration of and for the purpose of obtaining any and all . . . Federal financial assistance," that they "will comply with Title VI . . . and all requirements imposed by *or pursuant* to . . . 45 C.F.R. Part 80. . . ."[25] By seeking and accepting ESEA funds pursuant to those assurances, respondents have agreed, in light of the guidelines, to take steps to insure that petitioners' inability to speak and understand English does not exclude them from education. Respondents should be required to make good on that commitment.

---

[25] The agreement in this regard is set forth in HEW Form 441. The Form 441 executed by San Francisco is reproduced in the appendix to this brief.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

STEPHEN J. POLLAK
RALPH J. MOORE, JR.
FRANKLIN D. KRAMER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

Attorneys for Amici Curiae

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D. C. 20036

Attorney for Amicus National Education Association

PETER T. GALIANO
1705 Murchison Drive
Burlingame, Calif. 94010

Attorney for Amicus California Teachers Association

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

UNITED STATES OF AMERICA*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

CERTIFICATION OF TRUE COPY

Pursuant to the provisions of Section 3505, Title 42, United States Code and the authority vested in me by the Secretary (35 F.R. 922), I hereby certify that the annexed are true copies of the documents on file in the Department of Health, Education, and Welfare.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Department of Health, Education, and Welfare to be affixed, on this 23rd day of July, 1973.

/s/ Doris F. Hoard
DORIS F. HOARD
Secretary to the Deputy General Counsel

[SEAL]

* The certified copy of the documents reproduced in this appendix will be lodged with the Clerk of this Court.

ASSURANCE OF COMPLIANCE WITH THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE REGULATION UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

SAN FRANCISCO UNITED SCHOOL DISTRICT (hereinafter called the "Applicant") HEREBY AGREES THAT it will comply with title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80) issued pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives Federal financial assistance from the Department; and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant by the Department, this assurance shall obligate the Applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant for the period during which the Federal financial assistance is extended to it by the Department.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Applicant by the Department, including installment payments after such date on account of applications for Federal financial assistance which were approved before such date. The Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant.

Dated January 20, 1965

San Francisco Unified School District, Applicant

By /s/ Harold Mears
(President, Chairman of Board, or comparable authorized official)

135 Van Ness Avenue
San Francisco, California
(Applicant's mailing address)

HEW-441

(12-64) GPO 885-128

RECORD OF RECEIPT OF AND ACTION ON CIVIL RIGHTS ASSURANCES

Division of School Assistance in Federally Affected Areas

SCHOOL DISTRICT (Legal name, city, county, State)	APPLICATION NUMBER	
	—E—	—C—
San Francisco Unified School District San Francisco San Francisco County California	128	246

[X] 1. Receipt of HEW 441 dated ____ January 20, 1965

[X] 2. HEW 441 determined acceptable by SAFA ____ /s/ Ira C. Mason (Signature)

[X] 3. HEW 441 transmitted to EEOP for files ____ February 8, 1965 (Date)

[ ] 4A. Notification received from Equal Educational Opportunities Program that Assurance or Plan (shown below) has been accepted and the Federal payment may be released ____ (Date)

B. HEW 441	Court Order	Desegregation Plan
[ ]	[ ]	[ ]

C. Office of Education identification no. ____

Copy:

P.L. 815 file
P.L. 874 file
Financial folder
Statistical Record file

OE 4288 (1/65)